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No. 03-211

In The

# Supreme Court of the United States

DR. MARVIN FRANDSEN,

*Petitioner,*

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, STATE OF FLORIDA,

*Respondent.*

**On Petition For Writ Of Certiorari To The First District Court Of Appeal For The State Of Florida**

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ARGUMENT

### I. PETITIONER HAS STANDING TO BRING THIS FACIAL CHALLENGE

The DEP argues that Petitioner Frandsen has only a conjectural interest because Frandsen hasn't been arrested yet for creating an "actual abuse." This argument is invalid for two reasons.

First, this Court has stated that the essence of the standing requirement is whether the plaintiff has alleged a "personal stake". However, the injury may be "indirect" so long as it is "fairly traceable to the defendant's acts or omissions." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260-61 (1977).

Here, Frandsen has established that as an activist he has a continuing interest in conducting free speech activities in Florida state parks. Frandsen has established that the DEP has untrammeled discretionary power to make and enforce "time, place and manner" restrictions on speech up to and including the power to effectively prohibit speech altogether.

Frandsen has established that the DEP's power under color of the Rule has chilled his own speech and chills the speech of others to whom Frandsen wishes to be an audience.

Frandsen has established that the DEP under color of the Rule has issued unconstitutional and illegal commands and faces no restraints against doing so again. These illegal commands will be virtually unreviewable in state courts.

This Court has established that standing exists to bring a pre-enforcement facial challenge without demonstrating to an absolute certainty that the plaintiff will be prosecuted. A showing of 'an actual and well-founded fear that the law will be enforced' is sufficient. This is particularly true when the alleged harm, as here, includes the threat of self-censorship and the self-censorship of others. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

The 11th Circuit has recently stated that "no authority even remotely suggests that proximate causation applies to

the doctrine of standing. . . . even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Focus on the Family v. Pinellas Suncoast Transity*, No. 02-14442, 2003. C11.0000300, P. 44 (11th Cir. 2003) (Versuslaw).

Second, the DEP may not on appeal assert that Frandsen's interest in the Rule is only "conjectural" when at the outset of this case the DEP stipulated to Frandsen's standing to conduct a facial rule challenge as a "substantially affected" person under § 120.56(3), Florida Statutes (Pet. 29). (See also § 120.52(12), a "Party" is defined as "specifically named persons whose substantial interests are being determined in the proceeding.") In stipulating to Frandsen's standing to make a facial rule challenge the DEP has *de jure* already admitted that Frandsen's interests are legally substantive and not conjectural.

## II. THE LOWER STATE COURT CONSTRUCTION HAS NOT CURED THE RULE'S UNCONSTITUTIONALITY

The DEP vastly overstates the amount of narrowing construction conducted by the lower state court. The lower state court narrowed only one single aspect of only one clause within the Rule – the "public enjoyment clause." The narrowing performed on the "public enjoyment clause" of the Rule was limited to the interpreting "enjoyment" so as to remove overt consideration of public enjoyment (or lack thereof) of message content. However all other aspects of public "enjoyment," and all other clauses of the Rule were left un-narrowed by the lower state court (A. 80-81).

The lower state court did not construe the Rule to address any of the constitutional challenges brought to this Court in Frandsen's Petition for Certiorari.

Of particular note is the failure of the lower state court to construe the Rule so as to avoid the delegation of unbridled discretion to DEP employees, a pervasive issue throughout the Petition.

## III. THE DEP'S ANALYSIS REGARDING TIME, PLACE AND MANNER REGULATION FAILS TO REACH THE ISSUES RAISED IN THE PETITION

The DEP significantly does not dispute that Florida parks are public fora (Opp. Brief at 9).

The DEP's discussion of time, place and manner regulation under the traditional three-prong analysis (content neutrality, narrow tailoring, alternative avenues of communication) completely misses the Petition's establishment of the fact that the Rule is not a time, place and manner regulation of speech (Pet. 6-7). The Rule only delegates authority to park managers and park police to create *ad hoc*, case-by-case restrictions on speech. Any specific restriction created by a DEP employee might be analyzed under the standard three-prong test. However such analysis is inapplicable to the Rule itself because there are no specific restrictions to analyze. Further, Frandsen is not challenging the Rule via the three-prong test except insofar as unbridled discretion may interact with the test.

## IV. THE DEP'S "ACTUAL ABUSE" DEFENSE IS INVALID

Before this Court the DEP argues that the Rule "provides no penalty for failing to follow an official's instructions, only for actually creating a safety hazard or interference with other park activities" (Opp. Brief 6).

Contrary to the above statement the DEP has clearly on record represented that park managers and police can and do issue proactive prohibitions that are legally enforceable under color of the Rule (Pet. 6-7). In the court record the DEP has repeatedly stated and stipulated that legally enforceable restrictions are placed under color of the Rule on an *ad hoc*, case by case basis. The letter to Frandsen – issued by DEP attorneys representing the DEP – is only an example of clearly stated prohibitions issued under color of the Rule, where arrest is threatened if DEP prohibitions are violated (Pet. 5).

Even if *arguendo* the DEP's (current) interpretation of the Rule's action is accepted, the actual abuse defense is disingenuous. Whether or not a speaker actually creates as "safety hazard" or "interferes" with park activities is entirely dependent on a park manager or park policeman's personal opinion about unfathomable criteria as to what constitutes a "hazard" and what constitutes "interference" given that "interference" means anyone's discomfort for any reason, and that "park activities" literally mean anything and everything going on in a park (Pet. 6).

Only an extremely stalwart – and foolhardy – speaker would disobey a prohibition issued by a government official on the theory that only "actual" abuse would be prosecuted, when the determination of "actual abuse" is left entirely to the subjective opinion of the same official who issues the prohibition. The DEP's "actual abuse" defense is legally and in reality quite meaningless.

## V. THIS COURT SHOULD GIVE FULL REGARD TO THE COURT RECORD

Because the court record contradicts the DEP's position, the DEP repeatedly urges this Court to ignore the court record (Opp. Brief 1, 6). This Court should not accept the DEP's invitation.

First, the DEP misrepresents the status of the case. Frandsen never "abandoned his challenge to this letter" (Opp. Brief 6) or any other evidence in the court record. All evidence entered into the court record was entered with full cognizance by the Administrative Law Judge that only a facial rule challenge, and likely constitutional challenge on appeal, was before that court (Tr. 10-11, 83, 104, 428, 436 "the purpose of this hearing is to make a record for your constitutional challenge, should you decide to make that in the appellate court.")

Second, a Florida administrative law judge does not have jurisdiction to make findings related to a constitutional challenge (A. 53, Finding of Fact # 70).

Third, this Court has stated that in First Amendment cases appellate courts have an affirmative duty to make an independent examination of the court record without deference to lower court findings (Pet. 21).

## VI. WHY THIS COURT SHOULD GRANT CERTIORARI

This Court recently reaffirmed that "even contentneutral time, place and manner restrictions can be applied in such a manner as to stifle free expression.... We have thus required that a time, place and manner regulation contain adequate standards to guide the official's discretion and render it subject to effective judicial review." *Thomas v. Chicago Park District*, No. 00-1249, 2002.SCT. 0000013, P. 30 (U.S. 2002) (Versuslaw).

However, as in *Thomas, supra,* this Court's rulings opposing unbridled discretion in time, place and manner regulation of speech have occurred in the context of permit challenge cases. Because of this historical entanglement the DEP believes it has a free pass to exercise unbridled *ad hoc* discretion to restrict time, place and manner of speech as long as the DEP acts outside of a permit scheme.

The need for direction from this Court is illustrated by the opinion of the lower state court in this case which, sans a permit scheme, perfunctorily applied the threeprong test examined in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), without giving any consideration to the effects of unbridled discretion.

This case presents this Court with an opportunity to disentangle permit scheme issues from time, place and manner regulation questions. This Court should make a clear statement to lower courts, legislators and agencies that the U.S. Constitution operates outside as well as inside of a permit scheme. When regulating time, place and manner of speech officials may not arbitrarily dispense with constitutional guarantees of due process, equal protection, and First Amendment guarantees.

Respectfully submitted,
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